NO. 43205-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHAN J. GADBERRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state's late disclosure of an expert witness on the Thursday before a trial scheduled to start on Monday entitled Mr. Gadberry to an extension of the trial date.

2. The trial court erred in failing to grant Mr. Gadberry's request for a continuance.

3. Mr. Gadberry did not have effective counsel. His counsel failed to object to the irrelevant testimony provided by numerous detectives as to the duty assignments they held on the day they participated in Mr. Gadberry's arrest

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant is entitled to a continuance of his trial when, without the continuance, he will be forced to trial with an unprepared defense counsel. Here, defense counsel was unprepared for trial after the state endorsed an expert witness less than two days before the scheduled trial date. Did the trial court err in denying the continuance?

2. A defendant is entitled to effective counsel who will vigorously resist the admission of irrelevant harmful testimony. Here defense counsel ineffectively failed to object to such testimony from each of the numerous detectives who participated in the arrest of Mr. Gadberry. Did defense counsel's failure deny Mr. Gadberry effective counsel?

C. STATEMENT OF THE CASE

The state charged Nathan Gadberry with possession of methamphetamine with intent to deliver and possession of methamphetamine. CP 5-6. Mr. Gadberry's case was joined for trial with Danielle Newton who faced the same charges arising from the same incident. CP 5-6.

After the Thursday readiness hearing before the Monday jury trial, the state, for the first time, disclosed its intent to call FBI Special Agent Brian Acee as an expert on drug dealing. RP1 at 22, 24. The Monday trial was just 46 days after Mr. Gadberry's arraignment. RP1 at 6. Mr. Gadberry, who was in custody, wanted his trial held within the 60-day speedy trial. RP1 at 44.

Mr. Gadberry objected to the late disclosure of the state's expert and asked that Acee not be allowed to testify. RP1 at 22.. The trial court denied the request. RP1 at 92. In the alternative, Mr. Gadberry's defense counsel, Jason Bailes, asked to continue the trial to give him additional time to prepare for the expert witness. RP1 at 22, 41, 105. With the late endorsement of Acee, Mr. Bailes said he was not ready for trial and could not effectively represent Mr. Gadberry at trial. 1RP at 22, 41, 105, 137.

Co-defendant Ms. Newton objected to a continuance of the trial. She too requested that the court not allow the late-endorsed Acee to testify. RP1 at 23.

The prosecutor supported Mr. Bailes' request for a continuance. RP1 at 106-07.

The trial court refused Mr. Bailes' requested continuance citing its unwillingness to sever Mr. Gadberry's case from Ms. Newton's case. RP1 at 107. The court did require the state to make Acee available for a defense interview. RP1 at 33.

Mr. Gadberry's and Ms. Newton's trial started on Monday. Special Agent Acee did testify as a state's expert. RP4A at 811-74.

Testifying too were numerous police detectives from various specialized units. They talked about how they surveilled then arrested Mr. Gadberry and Ms. Newton en masse while Gadberry and Newton were sitting in a car in front of a Vancouver gas station. RP2A at 159-175, 274-83, 298-300, 302-13, 336-45; RP 2B at 348-74, 34; RP3B at 636-43.

The jury found Mr. Gadberry guilty as charged. CP 32-35.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. GADBERRY A CONTINUANCE AFTER THE STATE DISCLOSED AN EXPERT WITNESS LESS THAN TWO WORKING DAYS BEFORE THE START OF TRIAL.

1. The trial court has authority to grant a continuance over a defendant's objection in the administration of justice.

A trial court may grant a continuance under CrR 3.3(h)(2) "when required in the administration of justice." *State v. Williams*, 104 Wn. App. 516, 521-522, 17 P.3d 648 (2001). A continuance is appropriate if it causes the defendant to be "prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). The court must state on the record or in writing the reasons for the continuance. CrR 3.3(f)(2); *Williams*, 104 Wn. App. at 521-522. A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. CrR 3.3(b)(1)(i).

" '[A] trial court's grant or denial of a motion for a CrR 3.3 continuance or extension will not be disturbed absent a showing of a manifest abuse of discretion.' " *Williams*, 104 Wn. App. at 520-521 (2001) (quoting *State v. Silva*, 72 Wn. App. 80, 83, 863 P.2d 597 (1993)). Discretion is abused only where it is exercised on untenable grounds or for

untenable reasons. *State v. Gallagher*, 112 Wn. App. 601, 609, 51 P.3d 100 (2002), review *denied*, 148 Wn.2d 1023. (2002).

It is not a manifest abuse of discretion for a court to grant a continuance under CrR 3.3(b)(5) to allow defense counsel more time to prepare for trial, even over defendant's objection, to ensure effective representation and a fair trial. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (defense counsel's request for continuance of trial over defendant's objection appropriate given complexity and length of case); CrR 3.3(f)(2) provides, " The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2).

Moreover, continuing a joint trial of two defendants at one defendant's request beyond the speedy trial period required pursuant to CrR 3.3 is permissible even though the non-requesting defendant did not want continuance if the non-requesting defendant suffered only minor inconvenience. *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985). For defendants who are in custody, speedy trial is 60 days from arraignment. CrR 3.3(b)(1)(i). However, trial within 60 days is not a constitutional mandate. *State v. White*, 94 Wn.2d 498, 501, 617 P.2d 998 (1980); *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101 (1972).

"When speedy trial and consolidation considerations collide, the court must balance the competing interests." *State v. Torres*, 111 Wn. App. 323, 332, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003). The general rule is the trial court should sever cases to protect one defendant's right to a speedy trial. *State v. O'Neal*, 126 Wn. App. 395, 417, 109 P.3d 429 (2005); *Torres*, 111 Wn. App. at 332. But the trial court has discretion to proceed with a joint trial, especially if neither defendant claims prejudice. *Id.*

2. The administration of justice compelled a short continuance over Mr. Gadberry's objection.

The administration of justice compelled a short continuance so defense counsel Bailes would be prepared to meet the testimony of expert witness FBI Special Agent Acee. The trial court abused its discretion when it failed to grant the continuance.

Defense counsel Bailes candidly admitted he was not prepared to go to trial and did not feel he could adequately represent Mr. Gadberry given the state's endorsement of Acee less than two working days before trial. RP 1 at 14., 40-41, 107, 131; RP 2A at 137-38. Mr. Gadberry was entitled to be adequately represented. The way to make that happen was make sure his counsel was adequately prepared. Under *Strickland*, counsel has a duty to conduct a reasonable investigation under prevailing

professional norms. *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052; *In re Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

The trial court articulated one reason for denying defense counsel Bailes' requested continuance: the court did not want to sever the co-defendant's trial. RP 1 at 107. Even though there was still time left on the 60-day speedy trial, the court did not explore the option of a short continuance within speedy trial for one or both of the defendants. As noted in the preceding section, the waiver of speedy trial by one of the parties does not compel severance or necessarily result in a speedy trial violation on the part of the non-waiving party. *See Guloy*, 104 Wn.2d at 428. Trial courts properly grant severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) (*quoting State v. Philips*, 108 Wn.2d 627, 640, 741 P.2d 24 (1987)). Neither of the parties were advocating for such a severance.

The trial court abused its discretion in refusing to grant defense attorney Bailes the continuance he needed to adequately prepare to challenge the expert testimony of late-endorsed Special Agent Acee. As a consequence, Mr. Gadberry's convictions should be reversed and his case remanded to the trial court for possible retrial.

TRIAL COUNSEL'S FAILURE TO OBJECT TO EACH DETECTIVE SPECIFYING HIS CURRENT, BUT IRRELEVANT, DUTY ASSIGNMENT DENIED MR. GADBERRY EFFECTIVE COUNSEL.

Seven police detectives converged on a car stopped at a mini mart to arrest Mr. Gadberry and Ms. Newton. In limine, defense counsel took pains to ensure none of the detectives mentioned that Mr. Gadberry or Ms. Newton had arrest warrants as that would be seen as too prejudicial. But defense counsel failed to move in limine to prevent the detectives' testimony that was even more prejudicial: the name of each detective's duty assignment. Trial counsel's failure allowed each detective to insert irrelevant prejudicial information into the record thereby effectively denying Mr. Gadberry a fair trial and effective representation.

1. Mr. Gadberry is entitled to effective counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…" Wash. Const.

Article I, § 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show: (1) defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, meaning " a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. Any trial strategy "must be based on reasonable decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

2. Failure to object to irrelevant and prejudicial testimony is not an effective trial strategy.

When a person is on trial for possession of methamphetamine, defense counsel is not pursuing a reasonable trial strategy when he elicits his client's otherwise inadmissible conviction for possession of methamphetamine. *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364

(1998). After all, it is reasonable for the jury to find a person guilty of methamphetamine possession if they know the person is a criminal-type who possessed methamphetamine before.

When a defendant claims ineffective assistance based on counsel's errors in admitting evidence, the defendant must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. McFarland*, 127 Wn.2d 322, 337, 337 n. 4, 336, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

(a) Defense counsel's trial strategy was not reasonable.

As in *Saunders*, defense counsel here was not pursuing a reasonable trial strategy when he invited the jury to conclude Mr. Gadberry is a criminal type because it took at least seven detectives from specialized investigative units to arrest Mr. Gadberry for two common drug offenses. Defense counsel's failure was in making no effort to object to each detective naming his specialized investigative unit.

There was no legitimate strategy in failing to object to each detective naming his specialized unit. Through a motion in limine, defense counsel made a specific effort to make sure no one told the jury Mr.

Gadberry had a warrant for his arrest and that was why the police were there to arrest him. Instead, the testimony was that Mr. Gadberry was not only under surveillance, but that it took multiple police detectives from specialized units to swoop in and effect an arrest. Detectives Sofianos, Swenson, and Granneman were assigned to the Tactical Detective Unit. RP2A at 160, 303. Sergeant Hoss was the supervisor for that unit. RP 2B at 348. Detective Demmon was with the Neighborhood Response Team RP2A at 274. Detective Waddell was with the Safe Streets Task Force, an FBI gang taske force. RP2A at 298. Detective Homes was with the Drug Task Force. RP3B at 637.

The only conclusion the jury could draw from that scenario is that Mr. Gadberry is a particularly bad person, a criminal-type, who could not otherwise be taken in without enormous police involvement and that he must be guilty of whatever the police said he did.

Allowing that testimony to be heard was not a reasonable trial tactic.

(b) Had defense counsel objected to the naming of each detective's tactical unit, the judge likely would have sustained the objection.

Generally, all relevant evidence is admissible. ER 402. But to be relevant, evidence must have "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less

probable." ER 401. Even if the evidence is relevant, a trial court may still exclude it if the danger of undue prejudice substantially outweighs its probative value. ER 403; *State v. Norlin*, 134 Wn.2d 570, 583-84, 951 P.2d 1131 (1998).

The name of each detective's specialized unit had nothing to do with any issue in the case. While it is standard practice for the state to elicit the relevant training and experience from each police witness at trial - and the state did so in this case - there was no need for the state to elicit over and over again each detective's specialized unit. All that did was tell the jury over and over again that Mr. Gadberry was a bad person who could only be arrested with an overwhelming amount of specialized skill and tactical force. Had there been an appropriate objection to the naming of specialized units the trial court would have seen this for what it was: prejudicial irrelevant inadmissible evidence.

3. Had defense counsel not failed Mr. Gadberry, the outcome of Mr. Gadberry's trial likely would be different.

The evidence that Mr. Gadberry possessed methamphetamine with intent to deliver was weak. Mr. Gadberry had a scale in his pocket but methamphetamine users sometimes weigh the drugs they get from their dealers. While there was 4.8 grams of methamphetamine in a blue container on the Honda console, 4.8 grams alone does not dictate a dealer

amount. RP2B at 391. There was no testimony that methamphetamine has a "use by date." There was testimony that methamphetamine addicts are in fact addicts meaning that they need a regular fix. An amount of methamphetamine just short of five grams provides a regular fix.

Special Agent Acee speculated that the 4.8 grams of methamphetamine looked like it had not been "stepped on" meaning cut with other materials to increase the volume. RP4A at 854. If the volume were increased, there would be more to sell and more potential profits to be made. But Acee's testimony was speculative at best. An equally reasonable explanation is that Mr. Gadberry or Ms. Newton simple had a chunk of less diluted methamphetamine for person use.

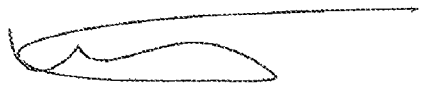
Additionally, there were no large sums of money or weapons in the car or on the persons of its occupants. There was no evidence that any plastic bag in the car was used, or intended for use as packaging material. While there were several cell phones in the car, only one had any suggestion of an interest in a drug purchase. That was the iPhone. There were texts from Tattoo Joe telling "Nate" it would be cool if "you'd kick some shit so I can smoke" and a request to an unnamed person for the price of an "8th of shit." Supp. Designation of Clerk's Papers, Exhibit 75. The texts were only useful to the jury to assess Tattoo Joe's intent in sending the text messages. CP 20 (Jury Instruction 11).

What the jury heard that was not speculation was that seven detectives from specialized units inexplicably took a keen interest in making sure Mr. Gadberry, an obviously bad person, was under arrest. Failure to object to that prejudicial irrelevant inadmissible testimony likely convinced the jury to convict Mr. Gadberry of possession with intent to deliver methamphetamine. That testimony coming into evidence owed itself to the failure of defense counsel.

E. CONCLUSION

Mr. Gadberry's convictions should be reversed and his case remanded to the trial court for further action.

Respectfully submitted this 16th day of October 2012.



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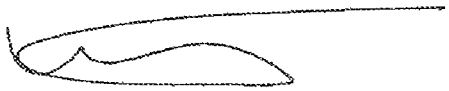
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Nathan J. Gadberry/ DOC#821524, Coyote Ridge Corrections Center, P.O. Box 769 Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 16, 2012, in Longview, Washington.



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